Supreme Court, U.S.
FILED
DEC 23 1971
E. ROBERT SEAVER, CLERK

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-83

JOHN A. STRAIT,

Petitioner,

v.

MELVIN R. LAIRD,
Secretary of Defense, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

Washington, D. C. THIEL PRESS 202 393-0625

PETITION FOR CERTIORARI FILED JULY 15, 1971
CERTIORARI GRANTED NOVEMBER 16, 1971

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

LIEUTENANT JOHN A. STRAIT, Petitioner, v. MELVIN R. LAIRD, Secretary of Defense, STANLEY R. RESOR, Secretary of the Army, LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army, MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California, Respondents.	Civil Action No. C-70-751-LHB

RELEVANT DOCKET ENTRIES

LT. JOHN A. STRAIT VS MELVIN R. LAIRD, Secty of Defense, et al. . .

1970:

Apr. 9	1. Filed complaint & Petn for Writ of H.C., summons issued.
Apr. 9	2. Filed ord for private process (Francis Heisler) as to Larson.
Apr. 9	3. Filed ord for private process (Francis Hesiler) as to Davidson.
Apr. 10	ORD aft hrg, appli. for TRO granted; contd to 4-24-70, 10AM for OSC.
Apr. 10	4. Filed order to show cause, returnable at San Jose, Calif., April 24, 1970 at 10 A.M., etc.

Apr. 23 6. Filed STIP & ORD cont hrg on petnr's OSC to 5-22-70, 10AM.

May 11 8. Filed petnr's FIRST AMENDMENT to petn for writ of HC, issued.

May 27 10. Filed STIP & ORD cont hrg on petnr's OSC to 6-12-70, 10:30 AM.

June 11 12. Filed resps ret on OSC & mo to dismiss, unnoticed.

June 12 ORD aft hrg, application for writ of HC submitted.

June 24 13. Filed ORD cont hrg on petn for writ of HC to 7-24-70, 2:30 PM. (Cys mailed)

July 22 14. Filed resps ret on OSC, mo to strike & to dismiss, mo to vacate TRO& ANS to petn for writ of HC.

July 24 ORD aft hrg, appli for conscientious objector status submitted.

July 28 ORD petnr's appli. for writ of HC denied.

July 31 16. Filed by petnr.; motion for reconsideration and/or for findings of fact & conclusions of law; motion for stay and motion for order shortening time for hearing thereon.

July 31 17. Filed order for stay of execution of order of July 28, 1970, pending hearing & determination of petnr's mo. for reconsideration to be heard on Aug. 4, 1970, 11:00 A.M. (Peckham)

Aug. 4 ORD pltfs mo for reconsideration of ord denying petn for writ of HC denied. TRO extended 10 days to allow petnr to appeal.

Aug 11 20. Filed notice of Appeal by Pltff (Mailed Clerk's Notice of filing appeal)

Aug 17 22. Filed Certified copy of Order from 9th Circ Court of Appeals "The mo for stay & inj pending appeal & the supporting papers having been con-

sidered, it is ordered as follows: 1. The mo for stay & for an inj pending appeal is denied. 2. It is hereby ordered on the court's own mo that the appeal be expedited. 3. Upon representation by petnr that no respondent's transcript will be necessary, it is ordered that the clerk's transcript of the record be filed as promptly as possible. 4. The court directs the following order of briefing: (a) Appellant may have through August 24, 1970 to file his brief. (b) Respondent's may have through Sept 1, 1970 to file an answering brief. (c) Appellant may have through Sept. 7, 1970 to file a reply brief if one is required. (d) The clerk is directed to set the case for argument on the S.F. calendar during the week of Sept. 8, 1970, and notify all ptys.

Aug 19 Made, Mailed Record on Appeal CCA

Aug 31 23. Filed Cross-appeal by resps.

PETITION FOR WRIT OF HABEAS CORPUS; FOR MANDAMUS; FOR INJUNCTION; FOR DECLARATORY RELIEF AND MOTION FOR A TEMPORARY RESTRAINING ORDER

[Filed April 9, 1970]

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA:

Petitioner complains of the Respondents and for a cause of action, says:

I

1. This action is brought under the constitution and the laws of the United States; under the Declaratory Judgment Act (28 USC Sec. 2201-2); under the Injunction Act (28 USC Sec 2282-2284); under the laws pertaining to jurisdiction of the court to issue a writ of habeas corpus (28 USC Sec 2241 (a); and other writs necessary or appropriate in the court's jurisdiction (28 USCA Sec 1651); under 28 USC Sec 1331 (a) et seq. and under the Federal Rules of Civil Procedure.

2. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interests and costs.

II

3. The jurisdiction of this court is invoked pursuant to the Constitution of the United States, the Amendments thereto and in accordance with the laws referred to under I and particularly under 28 USC Sec 1331 et seq.

III

Petitioner was born in San Francisco, California on June 19, 1943. He graduated from Lowell Public High School in 1961, from the University of California, Davis Campus, in June, 1966, and from Yale Law School in June, 1969. He entered the Reserve Officer Training Corps in September, 1961 and was commissioned as a 2d Lieutenant on June 10, 1966. He obtained a delayed active duty reporting date for attendance at Yale Law School. Petitioner is currently a reservist in the United States Army Control Group, United States Army Reserve Components Personnel Center.

During petitioner's period of study at law school he was assigned to the United States Army Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana, as a reservist. Petitioner, now working for the San Francisco Neighborhood Legal Assistance Foundation and Glide Memorial Church, is currently still assigned to Fort Benjamin Harrison, Indiana. Said assignment has been and is now simply a record-keeping assignment in that petitioner has never been present at Fort Benjamin Harrison. During this period of a delayed active duty reporting date, petitioner is an inactive member of the reserve. During this period he has not been subject to military orders, reserve meetings or summer active duty nor has he been compensated for military service. He has been ordered to active duty on April 13, 1970 at Fort Gordon, Georgia. (See Exhibit A, p. 76.)

IV

On January 20, 1970, petitioner mailed his request for discharge as a conscientious objector pursuant to Army Regulation 135-25, to the Commanding Officer, Officer of Personnel Operations, Fort Benjamin Harrison, Indiana. A copy of said application and supporting documents is attached hereto, marked Exhibit "A", and incorporated herein by reference as though it were set out at length herein.

Said request for discharge describes in great detail the origin and genesis of his beliefs:

> "My early religious training had little effect upon me at that time because my personal life was such that I was afraid to accept it. As an only child in a neighborhood with very few children, I grew up as a lonely bookworm." (Exhibit A, p.8.).

At an early age he discovered that his skill in target shooting was the only vehicle through which he could gain confidence and relate to other peers.

> "Primarily, because of this need to be a team member and enjoy the rewards of team membership, I joined the high school R.O.T.C. at Lowell." (p.9.).

Upon graduation from high school and entrance into college he found that he was confronted with the same problem of acceptance by his peers. He was disoriented and alienated and turned once again to R.O.T.C. However, petitioner states:

> "In the last two years of Davis, most of my insecurities about my personal abilities receded as my personal successes increased." (p. 12).

Upon graduation from Davis with his commission as a reserve officer, he was confident that the institutions which guided him thus far would continue to sustain him.

When he entered law school petitioner was no longer dependent on the institutions which formerly directed his life. He was in a position to take stock of himself in relationship to the world around him and to direct his own life and form his own values. He found law a bitter disillusionment:

> "Instead of a moral system, I found an amoral method of balancing power groups. Questions of individual happiness or even abstract justice were essentially irrelevant to the role of the lawyer."
>
> "The law, I found, was not going to be the source of guidelines for human behavior as I had hoped it would be. This shock forced me to re-examine many of my expectations of moral rectitude in human institutions as they presently existed. I was forced to begin thinking out my life all over again; what I was going to do, what my role would be." (Ex. A, p. 13.).

Petitioner became involved. He tried to direct his life and entered into projects which he felt were positive acts out of his own conscience and not acts directed by some institution or external set of values.

> "During these last two years I have put together the experiences of my life and have finally felt freed of my personal problems to a degree where I could deal with religious and personal obligations at a greater level." (p. 16.).

He turned to the values he received from his father. His father, a professor of Biophysics at the University of California, conceived of God as a unifying force in the universe, an omnipresence in each man and in all men.

> "My father derived his faith in individual men from his conception of unity in man and from his personal experiences in life." (p. 18).

The teachings of his father were difficult for petitioner to accept because he had been too insecure to be able to understand the "benign nature of the Supreme Being." Now he was face-to-face with himself and his new awareness and had to overcome his constitutional reluctance to confront a situation which required an act of conscience.

The experiences of a lifetime, from the lonely needs of an alienated youngster to the mature and successful graduate of a good law school, crystallized his religious beliefs. As petitioner states:

> "The last year of my life has been a stormy period of soul-searching and agonizing, trying to reconcile my beliefs and conscience with my contract with the Army." (p. 19).

Petitioner had never been in a situation where he had to confront the possibility that his individual act of faith could force him to be in conflict with authority figures who had guided him and protected him from having to make a judgment.

The death of Petitioner's cousin, a conscientious objector, broke the spiritual bind and freed him to assert himself. Petitioner's experiences from the first day of law school to hsi graduation culminated in the filing of his application to the Army requesting that he be discharged from the Army because of his religious belief in the sacredness of human life and his resulting conscientious objection to participation in war in any form.

V

Petitioner's application sets forth the nature of his religious beliefs. Petitioner explains that it is his belief that "human life is sacred." He cannot participate in the taking of human life. Petitioner believes in—

> "A supreme Being, a spiritual unity which exists in all men. This Supreme Being is felt by each of us as a drive which forces us out of our individual selves and makes us try to unite with other men in mutual harmony and love. This Supreme Being is manifested in *all* men and in each man. All men have, and each man has, the potential to fulfill the goal of this Supreme Being which would be "heaven on Earth." This would be the highest expression "of human nature. It can only be achieved by men living in total harmony and mutual love. Because this is the goal, the very nature of man, which each of us hopes to attain, it transcends any individual and is the spiritual guideline by which we may achieve fulfillment. This Supreme Being cannot be challenged or destroyed by individual men. It exists independently of any one man and is the sum total of men." (p. 4.).

Petitioner cannot kill because to kill would be a violation of the unity with mankind. It would irrevocably cut him off and place him in "Hell on Earth" because life would have no meaning any more and it would be replaced by absolute cynicism and it would be "existence without hope." He believes that the dictates of the Supreme Being, as he conceives it, would be violated if he killed or participated in the killing which is the ultimate objective of the military mission.

VI

Pursuant to AR 135-25, petitioner was interviewed by Chaplain Ronald W. Burgess who stated that petitioner was "sincere in indicating that his religious beliefs preclude participating in war in any form." He further concluded that petitioner's convictions were "primarily religious in basis and origin." (Chaplain Burgess approved the application. (p. 72.).

Thereafter, petitioner was interviewed by Captain Thomas G. Wallace who is an officer in the grade of 0-3 and knowledgable in the policies and procedures relating to conscientious objection matters. Captain Wallace approved petitioner's application stating that petitioner did not "believe in the traditional God figure, but rather a 'state of existence in the world as a whole, a unity of people throughout the world.'" As explained by the hearing officer:

> "The ultimate goal for Lt. Strait is to 'deal with people as a whole.' Lt. Strait feels that once a person deals with all people as a whole, the resulting unity of this relationship becomes a 'Supreme Being.'" (p. 74).

Captain Wallace was somewhat perturbed about petitioner's political and social activities and whether or not these showed political rather than religious beliefs. However on the inquiry into this subject at length, the hearing officer concluded that petitioner's beliefs were, in fact, religious in nature and sincerely held. (p. 73-75).

VII

The aforementioned hearings with Captain Burgess and Captain Wallace were held pursuant to AR 135-25 which directs that the applicant be afforded these interviews on request from the USARCPC. (See Exhibit A, p. 66). Petitioner's application, filed as a non-unit reservist residing within the jurisdiction of General Philip B. Davidson, Commanding General, Fort Ord, California, was then forwarded through channels to the Commanding Officer, US Army Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana. At Ft. Benjamin Harrison a board of officers was convened and a decision rendered on April 6, 1970. Petitioner was orally informed on April 6, 1970, that the Department of the Army disapproved his claim. Thereafter, on April 7, 1970 petitioner was given the contents of the disapproval through the senatorial office of the Hon. Alan Cranston. The content of the Department of the Army's denial of petitioner's claim was set out in a letter

dated April 7, 1970 from the Department of the Army, Washington, D.C. The content of the letter is as follows:

> "Your request for a discharge based upon conscientious objection has been disapproved. The conscientious objector review board unanimously found that your alleged conscientious objector beliefs are not truly held and are poorly grounded in religious training and beliefs. The board further stated that any objection to war in any form you might truly hold is based on political reasons, sociological experiences, philosophical views, a personal moral code, an objection to a particular war.
>
> "In view of the above, letter order number A-03-601 remains in effect and you are to report to Fort Gordon, Georgia on 13 April 1970.
>
> "By Order of the Secretary of the Army.
>
> "s/ Col. Raymond Vawter
> Corps of Army Engineers
> Chief, Delayed Officer
> Management Division"

VIII

Petitioner submits that denial of his application for discharge as a conscientious objector is completely without basis in fact. Petitioner further submits that he is a true conscientious objector, that he presents more than just a *prima facie* claim, and that he was wrongfully denied classification as a conscientious objector.

Petitioner's request for discharge pursuant to AR 135-35 having been wrongfully denied by respondents, there is no longer any effective administrative remedy available to him. The Department of the Army, having taken final action, now requires him to proceed to report for active duty pursuant to a standing order which existed during the pendency of petitioner's application. Unless this Court acts on petitioner's behalf, he will be compelled by reason of his conscientious objection to participation in war in any form to refuse to report for training. He will thus face a General

Court Martial for violation of Article 90 of the Uniform Code of Military Justice which carries a maximum penalty of five years at hard labor and in addition a dishonorable discharge and forfeiture of all pay and allowances.

When Petitioner shall refuse to comply with the orders requiring him to report for active duty he will be arrested by the area commander which has geographical and personal jurisdiction over petitioner and tried by Court-Martial. While pending Court-Martial, he will probably be put in pre-trial confinement. As a consequence thereof, petitioner requests that this Court act on his behalf and determine his status as a conscientious objector without forcing him to submit to military orders, training and discipline or suffer the inevitable odium of arrest and detention by the military authorities in this jurisdiction.

IX

Petitioner, on advice of counsel has not submitted an application to the Army Board for the Correction of Military Records on the ground that said application presents no effective or substantial remedy in that the Department of the Army has taken the position that its decision is final.

Further, the Solicitor General in *Craycroft v. Farrell*, No. 718 Mis. has taken the position that—

> ". . . proper application of the exhaustion of remedies principle does not mandate application to boards for correction of records of these services."

In the Supreme Court's Per Curiam Decision in *Craycroft v. Farrell* dated March 30, 1970, the court stated:

> "Upon consideration of the suggestion of the Solicitor General and upon an examination of the entire record the petition for a writ of certiorari is granted, the judgment of the United States Court of Appeals is vacated and the case is remanded to that court.
>
> "The Solicitor General conceded that the administrative remedies which the Court of Appeals held should first be exhausted by the petitioner, have either been exhausted or are nonexistent."

Similarly in *Bratcher v. Laird*, No. 1391 Misc. dated March 16, 1970, the court vacated and remanded another case which posed the exhaustion problem sending it back to the Ninth Circuit to see if they wish to adhere to its decision in light of the Solicitor General's position and with the strong suggestion that if the Court of Appeals does not wish to stand by their own position on the exhaustion principle that the case be sent to the District Court.

X

Respondents MELVIN R. LAIRD, The Secretary of Defense; Respondent STANLEY R. RESOR, the Secretary of the Army; respondent Lieutenant General STANLEY LARSON, Commanding General, Sixth U.S. Army; and respondent MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California, are the respective authorities to recommend and who are authorized to act in and who have the authority to convene a court-martial which we expect to try this petitioner when he is compelled for reasons of religious training and belief and his act of conscience emanating therefrom, to refuse to obey any order by military authorities, the carrying out of which is made impossible by petitioner's conscientious objection to participation in military life.

XI

By reason of the facts set forth above, a controversey exists between petitioner and respondents where petitioner asserts that the act of respondents in denying his application for discharge pursuant to AR 135-25 was wrongful and without basis in fact; whereas respondents assert that since the application for discharge was denied that he is required to report for active duty and that he has no remedy for testing respondent's refusal to grant him a discharge.

XII

Petitioner submits that this court has, and ought to take jurisdiction over this controversy between petitioner and respondents because:

(a) Unless this court takes jurisdiction and grants its order to petitioner, he will, because of his religious belief and conscience, be compelled to commit a military offense and therefore he will face a court-martial before obtaining a Federal Court's review of his claim that he is entitled to the granting of his twice-submitted request for discharge under AR 135-25.

(b) The petitioner exhausted all effective and available administrative remedies and he has no further protection except the one herein requested from this Honorable Court.

(c) That petitioner ought not to be compelled to commit a military offense and ought not to be compelled to face the possible punishment of a general court martial having jurisdiction comparable to civilian courts presiding over felony charges because such a procedure would be in violent disregard of the principles set forth by the Supreme Court of the United States in *Dombrowski v. Pfister*, 380 US 479 85A Supreme Court 1116 (1965), as well as other cases which all attempt to eliminate unnecessary procedural obstacles to the exercise of the constitutional rights.

(d) This petitioner, as an in-service Conscientious Objector is entitled to the same judicial review on a habeas corpus proceeding as a civilian registrant whose claim has been denied because both are facing possible illegal restraint and the denial of this petitioner of such a review would be in violation of the equal protection guarantee of the Fifth Amendment to the United States Constitution.

(e) Because the pertinent Army Regulation, AR 135, 25, which prescribes the policies, criteria and procedures governing the disposition of Reserve members of the Army who claim to be conscientious objectors is lacking in the minimum requirements of procedural due process and thus petitioner is and was deprived of his constitutional rights under the Fifth Amendment to the Constitution.

(f) Denial of the petitioner's application was without any basis in fact and was unreasonable, arbitrary and discriminatory and thus a denial of the equal protection of the law.

XIII

The past acts and the threatened action of the respondents are illegal, unlawful and beyond the scope of respondent's authority for the following reasons:

(a) AR 135-25 authorizes and requires respondents to cause the release from military duty of an enlisted man, such as petitioner, who *prima facie* presented a request showing him to be a bonafide Conscientious Objector, which objection is based on religious training and belief.

(b) Title 50 U.S.C. Sec. 4, 5, 6 (j) provides that nothing contained in that Title shall be construed as to require any person to be subject to combatant service in the armed forces of the United States who, by religious training and belief, is conscientiously opposed to participation in war in any form. Plaintiff qualifies under such exemption from military service, and respondent's insistence that he participates and subjects himself to combatant training and service is unlawful.

XIV

Petitioner did and will suffer irreparable injuries because of the unlawful and unconstitutional acts of the respondents and the damages resulting from such injuries are not monetarily compensable and the respondents threaten to continue their unlawful and unconstitutional acts unless they will be restrained by order of this Honorable Court.

XV

Petitioner is entitled to declaratory relief setting forth that he is entitled to be classified I-O pursuant to AR 135-25 and that in accordance with AR 135-25 and the *prima facie* case set forth by him that he is entitled to be discharged and separated from the military service as a Conscientious Objector.

XVI

Petitioner is entitled to a writ of habeas corpus because petitioner is within the custody of the area commanders of US Army, should they wish to order him to stand trial for court-martial and to perform as a member and officer of the United States Army. Petitioner is under the mandate of the Secretary of the Army to report for active duty and is thereby restrained from doing anything other than conforming with the outstanding order of respondent Secretary of the Army.

XVII

Petitioner is entitled to an injunction directed to the respondents, their agents, servants, deputies and all others acting on their behalf, restraining them from giving such orders to the petitioner which are contrary to his religious beliefs and to his conscience as set forth in his application filed under AR 135-25 and further restraining them from ordering petitioner to be tried before a court martial for his conscientious inability to participate in combat training in the armed forces of the United States because of his religious training and beliefs which makes it conscientiously impossible for petitioner to participate in war or in preparation therefor in any form.

XVIII

Petitioner is entitled to a writ of mandamus on the ground that the denial of his claim by respondents was without any authority since it was not founded on any basis in fact. Petitioner is entitled to an order of this court directing respondents to classify him as a conscientious objector and to proceed to separate him from the military service pursuant to Army Regulation 135-25.

WHEREFORE, petitioner prays:

1. That this Court declare that the threatened acts of the respondents and all others acting on their behalf, ordering petitioner to report for active duty or to be tried before a

court-martial for his conscientious inability to participate in war or preparation for war in any manner whatsoever, are illegal;

2. That this Court declare that petitioner is entitled to be separated from military service pursuant to AR 135-25.

3. That respondents MELVIN R. LAIRD, Secretary of Defense; STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army; MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California, their agents, servants, deputies and employees, and all others acting on their behalf be temporarily enjoined or restrained from requiring petitioner to report for active duty which order is contrary to his conscientious objection to war in any form or from assigning petitioner duties contrary to his beliefs or from depriving this court of jurisdiction pending determination of this proceeding and from commencing or prosecuting any court martial against petitioner for any refusal to act or obey any order which conflicts with petitioner's claim as a conscientious objector;

4. That respondent's MELVIN R. LAIRD, Secretary of Defense; STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army; MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California; their agents, servants, deputies and employees, and all others acting on their behalf, be permanently enjoined or restrained from assigning petitioner duties contrary to his conscientious objection;

5. That a writ of habeas corpus issue out of this Court to respondents commanding them to have the body of this petitioner before the court and to abide by the further orders of this court;

6. That if this Court finds that petitioner must proceed before the Army Board for the Correction of Military Records, then to hold this action in abeyance and temporarily enjoin respondents as requested in the third prayer;

7. For costs of suit incurred herein and for such other and further relief as the Court deems just.

Dated: April 7, 1970 /s/John A. Strait,
Petitioner

Mrs Schaefer/js/2808

AMAGR-1A Strait, John A. 1st Ind
SSAN 548-64-9018 (3 Feb 70)
SUBJECT: Application for Discharge as a Conscientious Objector

HEADQUARTERS SIXTH UNITED STATES ARMY,
Presidio of San Francisco, California 94129, 9 Feb 1970

TO: Commanding General, US Army Training Center, Infantry and Fort Ord, Fort Ord, California 93941

1. Request the assistance of your Command in processing the application for discharge as a Conscientious Objector of 1LT John A. Strait, SSAN 548-64-9018, MP-USAR, assigned USAR Components Personnel Center, Ft Benjamin Harrison, Indiana 46249. The provisions of AR 135-25 will be followed in processing this application.

2. Upon completion of action, request reports of interviews required, statement of officer (paragraph 7a(2), AR 135-25) and DD Form 1589, be returned to this headquarters, ATTN: AMAGR-1A, together with attached application. Progress reports, requested in paragraph 3, basic letter, will also be forwarded to this headquarters rather than to Fort Harrison.

3. LT Strait is being informed of this referral of his case to your headquarters.

FOR THE COMMANDER:

2 Incl
nc.

H.L. LIGIER
Chief, AG Res Forces Div

Copy furnished:
1LT Strait

CO, USARCPC, ATTN: RCPO-R

U.S. ARMY RESERVE COMPONENTS PERSONNEL CENTER
FORT BENJAMIN HARRISON
INDIANAPOLIS, INDIANA 49249
RCPO-R

RCPO-R 3 February 1970

SUBJECT: Application for Discharge as a Conscientious Objector

1LT John A. Strait, 548 64 9018, MP
24555 South San Luis Avenue
Carmel, California 93921

1. Your request for discharge as a conscientious objector has been received and is being processed as expeditiously as possible.

2. In the event that a determination is not made by your reporting date, 13 April 1970, you will be expected to comply with your active duty orders to report to Fort Gordon, Georgia.

BY ORDER OF THE SECRETARY OF THE ARMY:

1 Incl
Cy ltr to Sixth Army
3 Feb 70

EDWARD C. LEMIUEX
CPT, MSC
Acting Chief, Delayed Officer Management Div
US Army Reserve Components Personnel Center

Copy furnished:
CG, Sixth USA, ATTN: AMAGR-1A

REFERENCE your letter of 1 February 1970, forms are returned for completion in view of above letter from this office.

App. 20

HEADQUARTERS
UNITED STATES ARMY TRAINING CENTER, INFANTRY
AND
Fort Ord, California 93941
Office of the Staff Judge Advocate

18 Feb 70
DATE

CONSCIENTIOUS OBJECTOR'S REQUEST/FOR APPEARANCE

I have been advised that I have the right to appear in person, with counsel retained by me, if desired, before an officer in the grade of 0-3 or higher who is knowledgeable in policies and procedures relating to conscientious objector matters, for the purpose of presenting my application for (discharge) as a conscientious objector. I (request) the opportunity for personal appearance.

I (do) desire to have retained counsel present with me.

/s/John Aurom Strait
Printed Name

/s/John A. Strait
Signature

0548-64-9018 (1st LT)
Grade, SN, SSAN

Having been advised by me of his rights, the above individual personally made the choice indicated in the above statement.

/s/Robert A. Wicker
Printed Name

/s/Robert A. Wicker
Signature

CPT, STA, 237-66-0914
Grade, Branch, SN, SSAN

AMNOR-AGFW Strait, John A. 2d Ind
548-64-9018 (3 Feb 70)
SUBJECT: Application for Discharge as a Conscientious Objector

PERSONNEL ACTIONS BR, AG SECTION, Ft Ord, CA 93941 19 Feb 70

TO: CO, USAH, Mental Hygiene Dept (AMNOR-MED-NP)

1. Attention is invited to Sixth United States Army letter (1st Ind) dated 9 Feb 70.

2. This command has been directed to process the 1-0 application for 1Lt John Straight.

3. Accordingly, please schedule Lt Straight for a psychiatric evaluation in accordance with Ft Ord, Reg 600-4.

/s/ROBERT M. ROSSELLI
2LT, AGC
Asst AG

DEPARTMENT OF PSYCHIATRY
UNITED STATES ARMY HOSPITAL
SPECIALIZED TREATMENT FACILITY
Fort Ord, California 93941

AMNOR-MED-NP 19 February 1970

STATEMENT

RE: STRAIT John A., 1Lt., 548-64-9018

The subject is referred for psychiatric evaluation in conjunction with his application for 1-0 status.

The subject shows no signs of psychiatric disease which would warrant the disposition of his case through other than administrative channels.

/s/Robert J. Riopelle
MAJOR, MC
Psychiatrist

DEPARTMENT OF THE ARMY
U.S. Army Reception Station
Office of the Chaplain
Fort Ord, California 93941

AMNOR-RS-CH 20 February 1970

SUBJECT: Request for 1-0 Classification

Commanding Officer
USAR Components Personnel Center
Fort Benjamin Harrison
Indiana 46249

1. I have interviewed 1Lt John A. Strait, SSAN 057-14-117, in reference to his application for a 1-0 classification.

2. I believe that he is sincere in indicating that his religious beliefs preclude participating in war in any form.

3. I believe that his convictions are primarily religious in basis and origin.

RONALD W. BURGESS
Chaplain (CPT), USA
Reception Station Chaplain

Office of the Staff Judge Advocate

AMNOR-SJA 2 March 1970

SUBJECT: 1LT John Avrom Strait, 548-64-9018

Commanding General
USATC, Infantry and Fort Ord
ATTN: AMNOR-AGFR
Fort Ord, Ca 93941

1. Pursuant to paragraph 7b(3), AR 135-25, 1LT John Avrom Strait personally appeared before me on 20 February 1970 for the purpose of presenting his application for discharge because of his conscientious objection to participation in war in any form (1-0). LT Strait was represented at this hearing by Mr. Richard M. Silver, Attorney at Law, of the firm of Heisler and Stewart, Carmel, California.

2. The following documents were submitted by LT Strait as additional information to be attached to his application: a telegram from William S. Coffin, Jr., Chaplain at Yale University (Incl 1); a letter from the Reverend Eugene J. Boyle, San Francisco, CA (Inc 2); and a letter from Reverend Martin Murdock, Berkeley, CA (Incl 3).

3. LT Strait is a single male, aged 26. His educational background consists of a B.A. Degree in History from the University of California at Davis, and an L.L.B. in Law from Yale University. LT Strait completed R.O.T.C. at University of California at Davis, and was commissioned into the Military Police Corps in June 1966. He was then placed on a delay reserve status to attend law school. He has completed law school and has received orders to report to Fort Gordon, Georgia for entrance on active duty on 16 April 1970. LT Strait has submitted this application requesting assignment to the Selective Service Civilian Work Program in lieu of entering active duty in the Army.

4. LT Strait is not a member of a church. He is affiliated with the Glide Memorial Church in San Francisco, a Methodist Church. LT Strait is not a member of the Methodist faith, but rather just likes this particular church. LT Strait stated that he doesn't believe in the traditional God figure, but rather a "state of existence in the world as a whole, a unity of people throughout the world." The group experience which results from this unity of people is "the Supreme Being" as set forth by LT Strait. LT Strait believes that the primary force operating against the Supreme Being is the inability of people to know themselves. He stated that you must not label people with names such as "nigger" but you must look to the underlying human qualities. One must understand oneself and try to extend oneself across different social barriers and the lack of communication surrounding these barriers. The ultimate goal for LT Strait is "to deal with all people as a whole." LT Strait feels that once a person deals with all people as a whole, the resulting unity of this relationship becomes "a Supreme Being." He stated that violence cannot be used to try and destroy people because of personal or racial prejudice. He is totally dedicated to non-violence, and says that violence will never work. LT Strait says that he can never participate in the Army, not even as a 1-A-0, because "the mission of the Army is to carry out the nation's policy, and specifically to kill the enemy." He stated he cannot tolerate this method of dealing with people.

5. During his matriculation at the Yale University School of Law, LT Strait became very active in political and pacifist activities. He was a member of the Law Students' Civil Rights Research Council Chapter at Yale, was active in legal seminars on the draft and conscientious objection, participated in non-violent demonstrations against the draft, was one of a group of Yale law students who participated in Negro voter registration in Mississippi, worked in the McCarthy Campaign for President as an anti-war campaigner, and worked for the United States Commission on Civil Rights in Alabama and the Southwestern

United States. All of these activities tend to show political rather than religious beliefs, and I asked LT Strait if his beliefs were not essentially political rather than religious. Lt Strait stated that his beliefs "center around man." All religion is based on man, and cannot be divorced from dealings with man. LT Strait stated that he finds his "Supreme Being in man." Based upon LT Strait's stated beliefs, and the sincerity with which he appeared to hold these beliefs, it is my determination that LT Strait's beliefs fall within a *very liberal* interpretation of the case of *United States v. Seeger*, 85 S.Ct. 850 (1965).

6. LT Strait stated that his beliefs as they now exist became fixed during his second year of law school. He had been examining his life for a long time, and finally decided that he could not participate in the Army. It is my opinion that LT Strait's beliefs are sincerely held. The letters of support and recommendation attached to LT Strait's application are unquestionable, and all support LT Strait's position. LT Strait has in his application expressed his willingness to perform work under the Selective Service Civilian Work Program for Conscientious Objectors if he is discharged as a conscientious objector. I do not think that LT Strait is attempting by this application to avoid service to his country. I therefore recommend approval of this application, and strongly urge that LT Strait be required to perform alternate Selective Service civilian work as a conscientious objector.

THOMAS G. WALLACE
CPT, JAGC.
Hearing Officer

Cy furn:
1LT John A. Strait, 548-64-9018
24555 South San Luis Avenue
Carmel, CA 93921
Heisler & Stewart
Attorneys at Law
ATTN: Mr. Silver
P.O. Drawer 3996
Carmel, CA 93921

DEPARTMENT OF THE ARMY
OFFICE OF PERSONNEL OPERATIONS
Fort Benjamin Harrison, Indiana 46249

RCPA-P 5 March 1970
LETTER ORDERS NUMBER A-03-101
SUBJECT: Branch Relief and Active Duty

JOHN A. STRAIT
204 Grand View Ave.
San Francisco, Calif. 94114

548-64-9018, 1LT MPC-USAR
MOS: 0005 9110 USAR Control Group (CADO), USARCPC, Ft. Benjamin Harrison, Ind. 46249

TC 452. Following BRANCH RELIEF directed:
Authority: AR 140-10
Relieved from: JAGC
Effective date: 5 March 1970

TC 112. The above named individual is, with his/her consent, ordered to ACTIVE DUTY in the grade held as a reserve officer of the Army. Individual is assigned as indicated and will proceed from his current location in sufficient time to report as indicated on the date specified.

ADMINISTRATIVE ACCOUNTING DATA
Auth: Title 10, U.S. Code, subsection 672(d)
Aloc: 05-R 3395
HOR; Same as SNL address
PL EAD/OAD: Same as SNL address
PPN: S5
Component: USAR
Sex: Male
Acct Clas: 2102020 32-28 P2110-21 S99999
PCS MDC: 1A00 1A01
Asg to Act dy Access Det: Fifth U.S. Army, Fort Sheridan, Illinois 60037
Eff date (Act dy Access Det): 11 April 1970

FOR THE INDIVIDUAL

Effective date of active duty: To be determined at first duty station.

Active duty commitment: Obligated volunteer officer 2 years

Temporary duty enroute at: U.S. Army Military Police School (3AW2MHAA00), Fort Gordon, Georgia 30905

Reporting date (TDY station): 13 April 1970

Period of temporary duty: Approximately 9 weeks

Purpose of temporary duty: Military Police Officer Basic Course Class number 6

Assigned to: USAG, (WOU3-AA), Fort Bragg, North Carolina 28307

Reporting date: 3 July 1970

Leave data: 15 DDALV upon completion of TDY

Availability date: NA

Port call data: NA

Special Instructions: Comply with the following numbered items of DA Supplemental instructions (Appendix B, AR 310-10): 1, 2, 16, 39, 51, 79, 81, 82

Quota source 88B provided by USARCPC.

Individual is relieved from USAR Control Group (OADO), USARCPC, on the effective date of active duty.

Officer will undergo physical examination within 5 days after reporting for duty.

BY ORDER OF THE SECRETARY OF THE ARMY:

/s/P. R. FERGUSON
[for] H. W. WHEELER
LTC, USA
Chief, Personnel Actions Division

DISTRIBUTION:
50 Officer Concerned

10 Officer DA Form 201
6 CC, Fifth U.S. Army, ATTN: ALFAC-CP (For MR and Other Admin Purposes)
2 Dir, OPD, OPO (OPMP)
10 OPO, RCPC, ATTN: RCPA-P
3 OPO, RCPC, ATTN: RCPO
2 CG, Third U.S. Army
5 Comdt, USAMPS, Ft Gordon, GA 30905 (For MR and Other Admin Purposes)
5 CO, USAG, Ft Bragg, NC (For MR and Other Admin Purposes)
1 Installation PO, Ft. Bragg, NC

[Filed April 10, 1970]

ORDER TO SHOW CAUSE

Good cause appearing upon reading the petition on file herein, it is

ORDERED, That MELVIN R. LAIRD, Secretary of Defense, STANLEY R. RESOR, Secretary of the Army, LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army, MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commainding General, Fort Ord, California, appear before this court at San Jose, California, on the 24th day of April 1970, at the hour of 10 a.m. of this day to show cause, if any they have, why a writ of habeas corpus should not issue herein as prayed for and that a copy of this Order be served upon them.

It is further ordered that the petitioner remain within the jurisdiction of this Court, that he not be assigned duties inconsistent with the provisions of AR 135-25.

San Francisco, California, this 10th day of April 1970.

/s/Robert H. Peckham
Judge of the United States
District Court

RETURN ON SERVICE OF WRIT

United States of America

NORTHERN DISTRICT OF CALIFORNIA

CIVIL

_____ Clerk's No. C-70-751

vs.

_____ U.S. Marshal's No. _____

SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I endeavored to serve & ORDER TO SHOW CAUSE served the annexed SUMMONS & COMPLAINT (Writs) on the therein-named LIEUTENANT GENERAL STANLEY LARSON (Name of individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with (if endeavor—describe what was done in endeavoring to serve) Lt. Col Ann Wansly, Ass't SJA, accepted on the (Name of individual or agent of company, corporation, etc.)

Behalf of General Larson

personally at (if endeavor—show addresses where endeavors made) _____

Presidio of San Francisco Bldg 39 (Address—Street number, apartment number, rural route, etc.)

San Francisco (City) California (State) in the said District

at 9:30 a.m.-p.m., on the 13th day of April, 19 70

SERVICE NOT COMPLETED

Date _____

I hereby certify and return, that on the _____ day of _____, 19____,

I received the within _____ and that after

diligent search, I am unable to find the within named _____

_____, within said district.

Marshal's fees 6.00

Mileage .96

GEORGE E. TOBIN
United States Marshal.

By Harry T. Hudson
Harry T. Hudson *Deputy.*

RETURN ON SERVICE OF WRIT

United States of America

Northern DISTRICT OF California

..... Clerk's No. C 70 751

vs.

..... U.S. Marshal's No. .....

SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I ~~endeavored to serve~~ served the annexed Success Order S/C and Summons (Writ)

on the therein-named United States of America, Secretary of Defence, and Secre-
(Name of individual, company, corporation, etc.)
-tary of the Army

by handing to and leaving a true and correct copy thereof with (~~if endeavoring to serve~~) William Spohn, Assn't U.S. Attny, and by sending by certified mail # 803958 2 copies to the Attorney General, WASH D C (Name of individual, company, corporation, etc.) and certified mail # 803960, one copy to Melvin Laird, Secre of Defence, and by certified mail # 803959 to Stanley R. Resor, Secretary of the Army.

personally at (if endeavor, show address where endeavor made) .....

450 Golden Gate Ave.
(Address—Street number, apartment number, rural route, etc.)

San Francisco (City) California (State) in the said District

at 10:00 a.m. ~~p.m.~~, on the 13th day of April, 19 70.

SERVICE NOT COMPLETED

Date .....

I hereby certify and return, that on the ..... day of ....., 19....,

I received the within ..... and that after

diligent search, I am unable to find the within named .....

..... within said district.

Marshal's fees $ 16.00 cp

Mileage .....

George E. Tobin
United States Marshal

By ..... Deputy.
Gary C. Brickey

FIRST AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS; FOR INJUNCTION; FOR DECLARATORY RELIEF

[Filed May 11, 1970]

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA:

Petitioner complains of the respondents and makes the following allegations in amendment to his previously filed petition in the above-entitled action, pursuant to Rule 15 (a) of the Federal Rules of Civil Procedure:

I.

Paragraph I, appearing on page 1 of the original petition, is amended to read as follows:

"I

"1) This action arises under the Constitution of the United States, Article III, Section 2, the First, Fifth and Fourteenth Amendments to the Constitution of the United States; under the Declaratory Judgment Act (28 U.S.C. Sections 2201 and 2202); under the Injunction Act (28 U.S.C. Sections 2282-2284); under the laws pertaining to jurisdiction of the Court to issue a writ of habeas corpus (28 U.S.A. Section 2241(a); under the laws pertaining to an action in the nature of mandamus (28 U.S.C. Section 1361); under the Administrative Procedure Act (5 U.S.C. Sections 701-703, *et seq.*); under the laws pertaining to jurisdiction for adjudication of a federal question (28 U.S.C. Section 1331(a), *et seq.*); and other writs necessary or appropriate in aid of the Court's jurisdiction (28 U.S.C. Section 1651); and under the Federal Rules of Civil Procedure.

"2) The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs."

II.

Paragraph II, appearing on pages 1 and 2 of the original petition, is amended to read as follows:

"II

"3) The jurisdiction of this Court is invoked pursuant to the Constitution and the laws of the United States as set forth in Paragraph I, above.

Petitioner has at all times maintained as his permanent domicile, the City and County of San Francisco, California. Petitioner pays his taxes in San Francisco, has his bank account and credit accounts in San Francisco, has his draft board in San Francisco, and all significant contacts have been and remain in San Francisco, California.

Petitioner has at all times pertinent herein been subject to the orders of respondent COLONEL JOHN HOFFMAN, Commanding Officer, United States Army Reserve, Components Personnel Center, Fort Benjamin Harrison, Indiana. Pursuant to the orders of said respondent, petitioner has had permission to reside in San Francisco, has received orders for physical examination in San Francisco, has been interviewed pursuant to the procedures set forth in AR 135-25 in Fort Ord, California, has received travel vouchers from San Francisco pursuant to orders, and has been permitted to delay his active duty in order to take the California Bar Examination which was taken in August, 1969, without success. (Petitioner has rescheduled himself for the August, 1970 Bar Examination in San Francisco, California.)

Petitioner is subject to the orders of said respondent COLONEL JOHN H. HOFFMAN in the jurisdiction of this Court. Attached hereto and incorporated herein as though fully set out is the Affidavit of Peter Haas, Staff Assistant in the offices of the Honorable Alan Cranston, United States Senator. Said affidavit is marked Exhibit "A," pages 78-80. Said affidavit shows that prior to the time respondent COLONEL HOFFMAN received notice of the pending litigation, petitioner was considered Absent Without Leave, and that he was subject to arrest by the Military Police as a deserter. However, after receipt of notice, petitioner was no longer considered AWOL and "new orders would have to be cut."

Attached hereto and incorporated herein as though fully set out is a copy of certain orders from the Office of Personnel Operations, Fort Benjamin Harrison, Indiana, and dated 17 April 1970. Said orders are marked Exhibit "A", pages 81-83. Said orders are new orders cut to conform with the pending litigation. Petitioner has been further informed by telephonic transmittal of a telegram that new orders have been cut to conform to the new hearing date of petitioner's request for relief. (See Exhibit "A," page 83.)"

III.

Paragraph X, appearing on page 8 of the original petition, is amended to read as follows:

"X

"Respondents MELVIN R. LAIRD, the Secretary of Defense; respondent STANLEY R. RESOR, the Secretary of the Army; respondent LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army; respondent MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California; and respondent COLONEL JOHN H. HOFFMAN, Commanding Officer, United States Army Reserve, Components Personnel Center, Fort Benjamin Harrison, Indiana, are the respective authorities who are unlawfully restraining the liberty of petitioner and should be required to discharge petitioner as a conscientious objector pursuant to AR 135-25. Further, said respondents are the respective authorities to recommend and who are authorized to act to convene a Court-Martial to try petitioner for refusing to report to active duty should petitioner refuse to report because of his conscientious objection to participation in war in any form."

IV.

Paragraph XI, appearing on page 8 of the original petition, is amended to read as follows:

"XI

"By reason of the facts set forth above and respondents' threatened acts and failure to discharge petitioner as a conscientious objector, a substantial Federal Question arises under the United States Constitution and the laws of the United States in that unless respondents are restrained and directed to discharge petitioner pursuant to AR 135-25 as a conscientious objector, petitioner's right to due process of law under the Fourteenth and Fifth Amendments to the United States Constitution will be unlawfully abridged, petitioner's right to the free exercise of his religion under the First Amendment to the United States Constitution will be unlawfully abridged, and petitioner's right to equal protection of the law will be violated.

Further, by reason of the facts set forth above and respondents' failure to discharge petitioner as a conscientious objector, they have failed to fulfill a plainly prescribed ministerial duty in discharging petitioner pursuant to Army Regulation 135-25 (see Exhibit "A", pages 84-89). The act of respondents in failing to discharge him as a conscientious objector is arbitrary and capricious and wholly without any basis in fact or law.

Further, respondents have failed to follow the basic guidelines of AR 15-6 in convening a board of officers to review petitioner's application for discharge. Said respondents failed to convene a Board with a quorum, did not permit petitioner to challenge any member of the Board, did not permit petitioner to present witnesses on his own behalf, did not permit petitioner to have civilian counsel present at all open sessions of said Board, and did not permit petitioner to rebut adverse allegations. Respondents have thus completely ignored the plain directives of

AR 15-6 and should be compelled to convene the Board pursuant to respondents' own regulation. (See Exhibit "A," pages 90-101, and 102-110.)

Further, petitioner seeks a declaratory judgment pursuant to the Declaratory Judgment Act (28 U.S.C. 2201 and 2202) on the basis of the Administrative Procedure Act (5 U.S.C. Sections 701-703, *et seq.*) to declare that petitioner is entitled to a discharge pursuant to AR 135-25 and to declare that respondents failed to follow their own regulations regarding the processing of his request for discharge, thereby denying petitioner due process of law. Petitioner seeks a further declaration that the respondents be restrained until they are made to comply with their own regulations in processing petitioner for discharge as a conscientious objector."

V.

Paragraph XII, subparagraph a), appearing on page 9 at line 4 of the original petition, is amended to read as follows:

". . . entitled to the granting of his request for discharge under . . . "

VI.

Paragraph XVII, subparagraph 3), appearing on pages 11 and 12 at lines 27-32 of the original petition, is amended to read as follows:

"3) That respondents MELVIN R. LAIRD, Secretary of Defense; STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army; MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California; and COLONEL JOHN H. HOFFMAN, Commanding Officer, United States Army Reserve, Components Personnel Center, Fort Benjamin Harrison, Indiana, their agents, servants, deputies and employees, and all others acting on their behalf be temporarily enjoined

or restrained from requiring petitioner to report for active duty which order is . . ."

VII.

Paragraph XVIII, subparagraph 4), appearing on page 12 of the original petition, is amended to read as follows:

"4). That respondents MELVIN R. LAIRD, Secretary of Defense; STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army; MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California; COLONEL JOHN H. HOFFMAN, Commanding Officer, United States Army Reserve, Components Personnel Center, Fort Benjamin Harrison, Indiana, their agents, servants, deputies and employees, and all others acting on their behalf, be permanently enjoined or restrained from assigning petitioner duties contrary to his conscientious objection;"

DATED: May 7, 1970.

HEISLER & STEWART
Attorneys for Petitioner
Herbert A. Schwartz

Exhibits

WU TELTEX SFO 1970 APR 28
MCLELANAFB SAC 4:25 PM

TLX19 GOVT PD
VIA MCCLELLAN AFB CALIF 28 APR
1LT JOHN A. STRAIT
204 GRAND VIEW AVE SFRAN
ACTION COPY TO ADDEE INFO COPY TO US ARMY MILITARY POLICE SCHOOL FT FXXX GORDON GA ACT BY ACCESS DET FIFTH US ARMY FT SHERIDAN IL
CPO-R
SUBJ: CHANGE IN REPORTING DATE
YOUR ACTIVE DUTY REPORTING DATE OF 27 APRIL 1970 HAS BEEN RESCHEDULED TO 25 MAY 1970. AMENDATORY ORDERS WILL FOLLOW UNDER SEPARATE COVER
DA OPO USARCPC FT BENJAMIN HARISON IN
325P PST

DEPARTMENT OF THE ARMY
U.S. ARMY RESERVE COMPONENTS PERSONNEL CENTER
FORT BENJAMIN HARRISON
INDIANAPOLIS, INDIANA 46249

RCPA 7 April 1970

MEMORANDUM FOR RECORD

SUBJECT: CONSCIENTIOUS OBJECTOR REVIEW BOARD RECORD OF PROCEEDINGS

1. Pursuant to letter, Headquarters, Department of the Army, RCPC, dated 27 March 1970 subject: "Conscientious Objector Review Board," a board of officers was convened at 0845 hours 27 March 1970 at Fort Benjamin Harrison, Indiana. The Board met to review and make recommendations on the application for a conscientious objector discharge (AR 635-25) of 1LT John A. Strait, 548-64-9018.

2. The following members of the Board were present:

WHEELER, HAROLD W., SSAN 506-14-8737, LTC, AGC (PRESIDENT)
GIESE, WILLIAM, SSAN 395-30-8318, LTC, INF
COFFEE, CHARLES W., SSAN 304-36-4633, MAJ, INF (RECORDER w/o vote)
BOLTON, PAUL J., SSAN 039-22-1888, CPT, CH

3. The following members of the Board were absent with the concurrence of the President and convening authority:

BALLINGER, MALCOLM B., SSAN 022-01-5227, LTC, CH
DOUGLAS, LAWRENCE W., SSAN 361-26-7130, LTC, INF
VAWTER, RAYMOND M., SSAN 511-22-8492, LTC, EN
WALLACE, FESTUS E., SSAN 283-26-1390, LTC, FA
CAYLOR, HOWARD W., SSAN 467-09-8519, MAJ, MSC
WEAVER, BYRON E., SSAN 307-32-4089, MAJ, AGC
ZACHARIAS, H.J., SSAN 446-22-0753, MAJ, INF
COLOGNE, KNOX M. III, SSAN 564-60-3975, CPT, JAGC (Advisory w/o vote)

LEMIEUX, EDWARD C., SSAN 024-32-4271, CPT, MSC
PARK, RALPH J., SSAN 405-32-7056, CPT, CH
WILSON, JEFFREY W., SSAN 395-38-2378, CPT, MC
(Advisory w/o vote)
STEVENS, HERSCHELL L.F., SSAN 447-14-8065, CW4, AUS

4. The Board members were polled to determine if any member had prior knowledge of this case that would prejudice his ability to render a fair and impartial decision. This poll revealed that no member of the quorum had any prior knowledge of the case.

5. Exhibits:

A - Copy of the Board Appointing Order.
B - Copy of Applicant's Request for Discharge.
C - Copy of Interviewing Medical Officer's Statement.
D - Copy of Interviewing Chaplain's Statement.
E - Copy of Hearing Officer's Statement.

6. Findings: Having carefully considered the facts and documents submitted by 1LT John A. Strait, 548-64-9018, incidental to his request for discharge as a conscientious objector (1-0) the Board finds: that the documentation submitted fails to qualify the applicant as a conscientious objector (classification I-0).

a. In reviewing this application, the Board considered every aspect of LT Strait's written application; letters from interested parties presented in support of his claim; and the opinions expressed by the Chief, Delayed Officer Management Division, interviewing Chaplain, Hearing Officer, and Military Medical Officer.

b. The Board unanimously believed that LT Strait's alleged conscientious objector beliefs are not truly held; are poorly grounded in religious training and belief; and any objection to war in any form he might truly hold is based solely on political reasons, sociological experiences, philosophical views, a personal moral code, and objection to a particular war. In accordance with paragraph 5c, AR 135-25, the latter 5 reasons are grounds for disqualification

of a conscientious objector application if such reasons constitute the sole basis for the conscientious objector claim. The Board's denial recommendation is based on, but not limited to, the following points:

(1) MPRJ (DA Form 201) -

(a) On 20 August 1968, petitioner requested that his delay status be extended until 1 January 1970 for the purpose of taking the California Bar examination, and qualifying for a Judge Advocate General commission. No mention was made of any conscientious objector beliefs.

(b) On 15 February 1969, he returned a form Certification of Medical Fitness indicating he was physically qualified for military service. Again, no mention of any conscientious objector beliefs.

(c) On 7 June 1969, LT Strait was promoted to First Lieutenant, USAR. He accepted this promotion without any apparent reservation, and again made no mention of his purported conscientious objector beliefs.

(d) On 1 October 1969, LT Strait called in to this Center and requested rescheduling of his active duty commencement date in order to take the bar examination. The above points are presented in correlation with the fact that he implies throughout his application that his beliefs have developed over the past 3 years. He further mentions to the Hearing Officer that his beliefs became fixed during his second year of law school, yet does not once mention these alleged beliefs until after he received his initial active duty alert letters. The Board unanimously believed that LT Strait is either a skillful opportunist, that his beliefs are not the burning issue he would have the Board accept, or both.

* * * * *

7. Recommendation(s): In view of the above findings, the Board recommends disapproval of LT Strait's request for discharge as a conscientious objector.

8. The Board adjourned at 1415 hours 3 April 1970.

5 Incls
as

/s/Harold W. Wheeler
HAROLD W. WHEELER, LTC
(PRESIDENT)

/s/Charles W. Coffee
CHARLES W. COFFEE, MAJ
(RECORDER)

9. Dissenting Vote(s): None

10. Action by Convening Authority: The recommendation of the Board is approved.

BY ORDER OF THE SECRETARY OF THE ARMY:

Distribution:
Original - TAG File.
Copy - Field 201 File.
Copy - USARCPC File.

/s/John H. Hoffman
JOHN H. HOFFMAN
Colonel, ADA
Commanding

App. 44

DEPARTMENT OF THE ARMY
OFFICE OF PERSONNEL OPERATIONS
Fort Benjamin Harrison, Indiana 46249

/11j

RCPA-P 17 April 1970

LETTER ORDERS NUMBER A-04-430

SUBJECT: Branch Relief and Active Duty

JOHN A. STRAIT
204 Grand View Avenue
San Francisco, Calif. 94114

548 64 9018 1LT MPC-USAR MOS: 0005 9110 USAR Control Group (OADO), USARCPC, Fort Benjamin Harrison, Indiana 46249

TC 452. Following BRANCH RELIEF directed:
Authority: AR 140-10
Relieved from: JAGC
Effective date: 17 April 1970

TC 112. The above individual is, with his/her consent, ordered to ACTIVE DUTY in the grade held as a reserve officer of the Army. Individual is assigned as indicated and will proceed from his current location in sufficient time to report as indicated on the date specified.

ADMINISTRATIVE ACCOUNTING DATA
Auth: Title 10, U.S. Code, subsection 672(d)
Aloc: 05-R-3395
HOR: Same as SNL
PL EAD/QAD: Same as SNL
PPN: S5
Component: USAR
Sex: Male
PCS MDC: 1A00
Asg to Act dy Access Det: Fifth U.S. Army, Fort Sheridan, Illin[illegible] 0037
Eff date (Act dy Access Det): 25 A[illegible] 1970

FOR THE INDIVIDUAL
Effective date of active duty: To be determined at first duty station.
Active duty commitment: Obligated volunteer officer 2 years

Assigned to: U.S. Army Military Police School
(3AW2MHAA00) Fort Gordon, Georgia 30905
Reporting date: 27 April 1970
Leave data: NA
Availability date: NA
Port call data: NA
Special Instructions: Comply with the following numbered items of DA Supplemental instructions (Appendix B, AR 310-10): 1, 2, 16, 39, 51, 79, 81, 82, 32
Individual is relieved from USAR Control Group (OADO), USARCPC, on the effective date of active duty. Officer will be utilized by CG Ft. Gordon in duties as deemed fit until next school class begins. Officer will undergo physical examination within 5 days after reporting for duty.

BY ORDER OF THE SECRETARY OF THE ARMY:

/s/P. R. Ferguson
for H.W. WHEELER
LTC, USA
Chief, Personnel Actions
Division

DISTRIBUTION:
50 Officer Concerned
6 CG, Fifth USA ATTN: ALFAG-CP (For MR and other Admin Purposes)
10 OPO, RCPC, ATTN: RCPA-P
2 CG, Third U.S. Army
15 CO, USAMPS Ft Gordon GA 30905 (For MR and Other Admin Purposes)
1 Instl PO Ft Gordon GA
2 Dir, OPD, OPO (OPMP)
10 Officer DA Form 201
3 OPO, RCPC, ATTN: RCPO

App. 46

DEPARTMENT OF THE ARMY
OFFICE OF PERSONNEL OPERATIONS
FORT BENJAMIN HARRISON, INDIANA 46249

/llj

RCPA-P
LETTER ORDERS NUMBER A-04-404 17 April 1970

SUBJECT: Revocation

JOHN A. STRAIT 548 64 9018 1LT MPC-USAR MOS:
204 Grand View Avenue 0005 9110
San Francisco, Calif. 94114

TC 469. Following orders are changed as indicated.

Action: Revocation

So much of: DA RCPA-P Letter Orders Number A-03-101, OPO, dated 5 March 1970, Subject: Branch Relief and Active Duty

Pertaining to: JOHN A. STRAIT 548 64 9018 1LT MPC-USAR MOS: 0005 9110

As reads: NA

How changed: NA

Authority: Paragraph 1-17c, AR 310-10.

BY ORDER OF THE SECRETARY OF THE ARMY:

/s/P. R. Ferguson
for H. W. WHEELER
LTC, USA
Chief Personnel Actions
Division

DISTRIBUTION:
15 Officer Concerned
6 CG, Fifth USA Attn:
ALFAG-CP

10 OPO, RCPC, ATTN: RCPA-P
2 Dir, ORD, OPO (OPMP)
3 OPO, RCPC, ATTN: RCPO
10 Officer DA Form 201
2 Third USA
5 Comdt, USAMPS Ft Gordon, GA 30905
5 CO, USAG, Ft Bragg, NC
1 Instl PO Ft Bragg, NC
OPO, RCPC FL 70 (REVISED)
1 NOV 69

DEPARTMENT OF THE ARMY
OFFICE OF PERSONNEL OPERATIONS
FORT BENJAMIN HARRISON, INDIANA 46249

/llj

RCPA-P
LETTER ORDERS NUMBER A-04-892 29 April 1970

SUBJECT: Amendment

JOHN A. STRAIT 548 64 9018 1LT MPC-USAR MOS:
204 Grand View Avenue 0005 9110
San Francisco, Calif. 94114

TC 469. Following orders are changed as indicated.

Action: Amendment

So much of: RCPA-P Letter Orders Number A-04-430, OPO, dated 17 April 1970, Subject: Branch Relief and Active Duty.

Pertaining to: JOHN A. STRAIT 548 64 9018 1LT MPC-USAR MOS: 0005 9110

As reads: Eff date (Act dy Access Det): 25 April 1970 Reporting date: 27 April 1970

How changed: LATR: Eff date (Act dy Access Det): 23 May 1970 Reporting date: 25 May 1970

Authority: Paragraph 1-17c, AR 310-10.

BY ORDER OF THE SECRETARY OF THE ARMY:

/s/P. R. Ferguson
for H. W. WHEELER
LTC, USA
Chief, Personnel
Actions Division

DISTRIBUTION:
15 Officer Concerned
6 CG, Fifth USA Attn: ALFAG-CP
10 OPO, RCPC, ATTN: RCPA-P
2 CG, Third USA
5 CO USAMPS Ft Gordon GA 30905
1 Instl PO Ft Gordon GA
2 Dir, OPD, OPO (OPMP)
10 Officer DA Form 201
3 OPO, RCPC, ATTN: RCPO

OPO, RCPC FL 70 (REVISED)
1 NOV 69

RETURN ON SERVICE OF WRIT

United States of America

Northern DISTRICT OF California

_____ Clerk's No. C-70-751

vs.

_____ U.S. Marshal's No. _____

SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I ~~endeavored to serve~~ served the annexed Summons (Writ)

on the therein-named Colonel John H. Hoffman Commanding Officer Fort Benjamin (Name of individual, company, corporation, etc.)

Harrison, Indiana

by handing to and leaving a true and correct copy thereof ~~with (name of person endeavoring to serve)~~ together with copy of complaint

~~by (name of person endeavoring to serve)~~ by certified mail # 220942 (Name of individual or agent of company, corporation, etc.)

personally at (if endeavor—show addresses where endeavors made) _____

150 Golden Gate Ave., San Francisco, California (Address—Street number, apartment number, rural route, etc.)

_____ (City) _____ (State) in the said District

at 9:00 a.m.~~p.m.~~, on the 12th day of May, 19 70.

SERVICE NOT COMPLETED

Date _____

I hereby certify and return, that on the _____ day of _____, 19____,

I received the within _____ and that after

diligent search, I am unable to find the within named _____

_____ within said district.

Marshal's fees $4.00

Mileage 0

George E. Tobin
United States Marshal.

By _____
Lester C. Young Deputy.

RETURN ON SERVICE OF WRIT

United States of America

Northern DISTRICT OF California

_____ Clerk's No. C-70-752

vs.

_____ U.S. Marshal's No. _____

SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I ~~endeavored to serve~~ served the annexed Summons (Writ) on the therein-named U.S.A. (Name of individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof together with copy of complaint ~~with (if endeavoring to serve) A.U.S. Attorney Spohn and by mailing two copies~~ (Name of individual or agent of company, corporation, etc.) to the U.S. Attorney General by certified mail # 220941

personally at (if endeavor—show addresses where endeavors made) _____

450 Golden Gate Ave. San Francisco, California (Address—Street number, apartment number, rural route, etc.)

_____ (City) _____ (State) in the said District

at 9:00 a.m. ~~p.m.~~, on the 12th day of May, 1970.

SERVICE NOT COMPLETED

Date _____

I hereby certify and return, that on the _____ day of _____, 19____, I received the within _____ and that after diligent search, I am unable to find the within named _____ within said district.

Marshal's fees $3.00

Mileage 0

George E. Tobin
United States Marshal.

By _____ Deputy
Lester C. Young

[Filed June 11, 1970]

RETURN ON ORDER TO SHOW CAUSE AND MOTION TO DISMISS

Respondents by their attorneys hereby file a Return to the Order To Show Cause issued by this Court on April 10, 1970 and move that this action be dismissed on the ground that this Court lacks subject matter jurisdiction. Attached hereto and made a part hereof as Exhibit "A" is a certified copy of the Memorandum for: President of the Conscientious Objector Board, dated August 21, 1968.

I. Statement of Facts

Petitioner was commissioned as a second lieutenant in the Military Police Corps of the United States Army Reserve in June 1966 as the result of successfully completing the Army Reserve Officer Training Course at the University of California at Davis. Thereafter, he was permitted to defer his active duty obligation in order to complete his course of studies at Yale University Law School, which he accomplished in June 1969. At all times during this delay petitioner was assigned to the United States Army Reserve Components Personnel Center, Fort Benjamin Harrison, Indianapolis, Indiana. On October 1, 1969 petitioner was informed he would be initially assigned to Fort Gordon, Georgia, for two years active duty commencing April 13, 1970. Petitioner filed an application for discharge based on conscientious objection under the provisions of Army Regulation 135-25 on January 20, 1970, which was denied on April 7, 1970. He was scheduled to report to United States Army Military Police School, Fort Gordon, Georgia, on April 13, 1970. However, these orders were cancelled and, pending determination of this matter, successive new reporting dates have been issued.

* * * * *

DATED: June 11, 1970

James L. Browning, Jr.
United States Attorney

By: Richard F. Locke
Assistant United States Attorney

Attorneys for Respondents

ORDER

[Filed June 24, 1970]

This is a petition for a writ of habeas corpus by a lieutenant in the United States Army Reserve. He has been ordered to report for active duty in Georgia. The question before the court today is whether we have jurisdiction to entertain this petition. Since we find that this court does have habeas corpus jurisdiction, we need not reach petitioner's alternative contentions regarding bases for jurisdiction.

The Government argues that since petitioner is assigned to the United States Army Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana, he is not in custody in this judicial district. See 28 U.S.C. § 2241. This precise question was considered in *Donigan v. Laird*, 308 F. Supp. 449, 451-53 (D. Md. 1969) and the court there held that the reservist did not have to bring his action in Indiana. This court concurs in the well-reasoned opinion of Judge Northrop both as a matter of law and of policy. Requiring petitioner to travel to Indiana to bring this action would be to exalt form over substance for the reasons given by Judge Northrop and would be directly contrary to the characterization of the writ recently rendered by the Supreme Court:

> [The writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from

> wrongful restraints upon their liberty. [*Peyton v. Rowe*, 391 U.S. 54, 66 (1968), quoting from *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).]

A closely analogous case is *Nason v. Secretary of the Army*, 304 F. Supp. 422 (D. Mass. 1969) where the petition was a physician who was a reservist training under the "Berry Plan." He was likewise assigned to Fort Benjamin Harrison but the district judge held that the petitioner was sufficiently in custody in Massachusetts to prosecute his petition there. *Id.* at 424.[1]

As to a proper respondent, for the reasons given by Judge Northrop we find that Col. John Hoffman, commanding officer at Fort Benjamin Harrison, is such an individual. Pursuant to 28 U.S.C. § 1391(e), the action may be brought in this district.

Therefore, we reject the Government's contention that this Court is without jurisdiction. This matter will be set for a hearing on the merits to be held Friday, July 24, 1970 in San Jose at 2:30 o'clock p.m.

IT IS SO ORDERED.

DATED: June 24, 1970.

Robert F. Peckham
United States District Judge

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[1] *Jarretta v. Resor*, No. 24,668, Ninth Circuit, April 21, 1970, is distinguishable primarily because Jarrett was on active duty and therefore had an "assigned post" to which he was required to report. He brought the action while on leave and in transit between duty stations.

[Filed July 22, 1970]

RETURN ON ORDER TO SHOW CAUSE AND ANSWER TO THE PETITION FOR WRIT OF HABEAS CORPUS

Respondents by their attorneys hereby make a Return to the Order To Show Cause and an Answer to the Petition for Writ of Habeas Corpus. On June 24, 1970 this Court ruled that it had jurisdiction to entertain this action as a Petition for Writ of Habeas Corpus and set the matter for a hearing on the merits for July 24, 1970.

I. MOTION TO STRIKE THE PETITION AND TO DISMISS THE ACTION

Respondents move this Honorable Court to strike the petition and to dismiss the action for lack of jurisdiction over the subject matter in accordance with Rule 12(b) of the Federal Rules of Civil Procedure (FRCP).

As reason for this Motion, respondents state that the Court lacks jurisdiction over the subject matter because neither the petitioner nor anyone acting in his behalf has verified the petition as required by Section 2242, Title 28, United States Code, as amended. Verification is a condition precedent to entertaining a Petition for Writ of Habeas Corpus in a Federal District Court. *Application of Gibson*, 218 F.2d 320 (9 Cir., 1954), *cert. den.* 348 U.S. 955 (1955); *Dorsy v. Gill*, 148 F.2d 857 (D.C. Cir., 1945), cert. den. 325 U.S. 890.

II. MOTION TO VACATE TEMPORARY RESTRAINING ORDER

Since the Petition for Writ of Habeas Corpus was not verified in accordance with Section 2242, Title 28, United States Code, as amended, suit has not been initiated. *United States ex rel. Smith v. Warden*, 87 F. Supp. 339 (D. Pa., 1949), *affirmed* 181 F.2d 847 (3 Cir., 1950). As a result, the Temporary Restraining Order heretofore issued in this cause is void *ab initio* and should be vacated.

III. RESPONSE TO ALLEGATIONS

Respondents by their attorneys (assuming *arguendo* that this Court reaches the merits of the case) hereby respond to the allegations in the Petition, as amended, and admit only those facts not inconsistent with the affirmative allegations of fact in Part IV below. We are responding in this manner since the numbered averments do not comply with the provisions of Rules 8(a) and (c) and 10(a) and (c) of the Federal Rules of Civil Procedure in that they are prolix and do not individually set forth single sets of circumstances but on the contrary recite irrelevant and argumentative matter. We believe that all pertinent facts are contained in the exhibits attached hereto.

IV. AFFIRMATIVE ALLEGATIONS

Attached hereto and made a part of this Return and Answer are copies of the complete administrative file pertaining to petitioner's application for discharge as a conscientious objector and Army Regulation 135-20, dated April 11, 1969. The aforementioned documents are designated Exhibits "B" and "C", respectively, in order to preserve sequential clarity. (Exhibit "A" was filed with our initial Return and Motion To Dismiss.)

1. Petitioner, upon successful completion of the Reserve Officer's Training Candidate program at the University of California, Davis, was commissioned as a second lieutenant in the Military Police Corps, United States Army Reserve, on June 9, 1966 (B. 154).

2. Petitioner entered the Yale University of Law School in September 1966. He sought and was granted successive delays to permit him to obtain his degree (B. 150, 140, 137, 133, 132, 126)—the last to terminate on June 30, 1969.

3. On January 18, 1969 petitioner was directed to submit a medical examination prior to his entry on active duty (B. 125). On February 18, 1969 he was examined and found physically fit to enter on active duty (B. 120-123).

4. On June 7, 1965 petitioner accepted without comment a promotion to the grade of First Lieutenant, United States Army Reserve (B. 153).

5. On July 9, 1969, after he [petitioner] had declined an appointment in the Judge Advocate General's Corps, petitioner was notified that he was scheduled to report to Fort Gordon, Georgia, on Feburary 9, 1970 to fulfill his two year active-duty obligation (B. 117).

6. Thereafter, petitioner's active duty orders were amended to an April 13, 1970 reporting date (B. 115, 116).

7. On January 20, 1970 petitioner submitted an application for discharge as a conscientious objector (B. 13-79).

8. On February 1, 1970 petitioner requested guidance from Army authorities as to his required medical examination and his active duty date of April 13, 1970 (B. 113) in view of his pending application.

9. On February 3, 1970 petitioner was notified that his application was being expeditiously processed; however, he was expected to comply with his reporting date of April 13, 1970 should a final decision not be forthcoming prior thereto (B. 112).

10. On February 18, 1970 petitioner was directed to report for a new medical examination as soon as possible (B. 111).

11. On February 19, 1970 petitioner was examined by a psychiatrist. Army Regulation 135-25, Paragraph 7b(2). The psychiatrist found no evidence of mental disease (B. 87).

12. On February 20, 1970 petitioner was interviewed by a chaplain. Army Regulation 135-25, Paragraph 7b(1). The chaplain found that petitioner was sincere in his beliefs and that these beliefs were "primarily religious in basis and origin" (B. 88).

13. On February 20, 1970 petitioner appeared with retained counsel before an officer in the grade of 0-3. Army Regulation 135-25, Paragraph 7b(3). The hearing

officer, Captain Wallace, found that (1) petitioner's beliefs were religious in nature; (2) his beliefs were sincerely held; and (3) these beliefs became fixed during petitioner's second year of law school (B. 90-92).

14. On March 20, 1970 the Chief of the Delayed Officer Management Division recommended disapproval on the basis that these beliefs merely constituted a personal moral code (B. 80-81).

15. On March 27, 1970 the Department of the Army, Conscientious Objector Review Board met at Fort Benjamin Harrison, Indiana, and in a report dated April 7, 1970 disapproved the application (B. 5-10). The Board based its denial on two grounds: (1) petitioner's lack of sincerity and (2) petitioner's lack of religious training and beliefs in support of his application, i.e., his beliefs constituted merely a personal moral code having its genesis in political reasoning, sociological experiences and philosophical views culminating in an aversion to a particular war–Vietnam (B. 6).

16. On April 7, 1970 petitioner was sent written notification of the disapproval and was directed to comply with his active duty reporting day of April 13, 1970 (B. 1).

* * * * * *

Dated July 22, 1970

James L. Browning, Jr.
United States Attorney

By: Richard F. Locke
Assistant United States Attorney

Attorneys for Respondents

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

Tuesday, July 28th, 1970

PRESENT: HONORABLE ROBERT F. PECKHAM, U.S. District Judge

Ramon E. Xavier, Clerk
Roberta Rogers, Court Reporter

* * * * *

Lt. John A. Strait vs. Melvin R. Laird, et al

This action came on for hearing on July 24th, 1970, before the Court, Honorable Robert F. Peckham, United States District Judge, presiding, and the issues having been duly presented and a decision having been duly rendered,
IT IS ORDERED AND ADJUDGED that the Petitioner's Application for Writ of Habeas Corpus, is denied.

* * * * *

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LIEUTENANT JOHN A. STRAIT,
Petitioner-Appellant,

v.

MELVIN R. LAIRD, Secretary of Defense;
STANLEY R. RESOR, Secretary of the Army;
LIEUTENANT GENERAL STANLEY LARSEN, Commanding General, Sixth United States Army;
MAJOR GENERAL PHILLIP B. DAVIDSON, JR., Commanding General, Fort Ord, California;
COLONEL JOHN J. HOFFMAN, Commanding Officer, United States Army Reserve, Components Personnel Center, Fort Benjamin Harrison, Indiana,
Respondents-Appellees.

No. 26,289

[Filed February 17, 1971]

On Appeal from the United States District Court for the Northern District of California

Before: MERRILL and KOELSCH, Circuit Judges, and JAMESON, District Judge*

MERRILL, Circuit Judge:

By these proceedings in habeas corpus appellant seeks judicial review of an administrative decision of the Depart-

*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

ment of the Army denying his request for discharge as a conscientious objector. This appeal is taken from judgment of the District Court for the Northern District of California denying, on the merits, the relief sought. A cross-appeal has been taken by appellees from that portion of the District Court's judgment holding that it had jurisdiction in habeas corpus.

Appellant is an officer in the United States Army Reserve. He received his commission in 1966 on completion of the ROTC course at the University of California at Davis. He was then placed on a delayed reserve status in order to permit him to attend law school at Yale University. Upon graduation from law school, and after being permitted to take the bar examination, he was, in July 1969, ordered to report to Fort Gordon, Georgia, on February 9, 1970 to commence two years active duty as an Army officer. The reporting date was later changed to April 13, 1970.

On January 20, 1970 appellant applied for discharge as a conscientious objector. Pursuant to Army regulations respecting reserve officers the application was submitted to the United States Army Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana. Processing of the application by interviews and hearing was had at Fort Ord, California, and the record was then forwarded to Fort Benjamin Harrison for review by the Conscientious Objector Discharge Review Board. On that Board's recommendation the application for discharge was disapproved by the commander of the Reserve Components Personnel Center. This action followed.

A. *JURISDICTION*

Threshold questions are presented by the cross-appeal of appellees respecting the habeas corpus jurisdiction of the District Court under 28 U.S.C. § 2241.

1. *Was appellant "in custody"?*

It is clear from §2241(c) that the petitioner's being in custody is a jurisdictional requirement. The statute, however, does not define custody. Since the Supreme Court's decisions in *Jones v. Cunningham*, 371 U.S. 236 (1963), and *Peyton v. Rowe*, 391 U.S. 54 (1968), the concept of custody in habeas corpus has taken on new dimensions, both of space and of time. See generally, Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1071-92 (1970).

The question posed is whether a member of the Army Reserve who has been ordered to report for active duty at a future date is presently under restraint sufficient to amount to custody.

This question was dealt with in *Hammond v. Lenfest*, 398 F.2d 705, 710-12 (2d Cir. 1968), where it was held that the restraints were sufficient to constitute custody—"a custody loose at the moment but a custody which may at any time be made as close as the military establishment, by future order or regulation, shall direct." 398 F.2d at 711.

We agree.[1]

2. *Was appellant held in custody within the territorial jurisdiction of the District Court?*

Section 2241(a) provides that the writ may be granted by District Courts "within their respective jurisdiction."

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[1] *Johnson v. Laird*, ___ F.2d ___ (9th Cir. Nov. 24, 1970), is not inconsistent. There the Army had refused to process the conscientious objection claim of a member of the National Guard filed after he had received orders to report for active duty. This court, in denying habeas corpus, held that the Army was not required to process the claim prior to the applicant's reporting as ordered. This ruling was not due to any lack of custody prior to reporting (the court recognized that potential restraint could suffice), but was based on the fact that assignment to active duty had been ordered as discipline for the petitioner's absence without leave, with which Army business this court refused to interfere.

> "The quoted statutory language limits the power of the District Court to hear and determine a petition for habeas corpus to those instances in which the applicant 'both is physically present in the court's territorial jurisdiction and is detained or held in custody within that jurisdiction.' *United States ex rel Rudick v. Laird*, 412 F.2d 16, 20 (2d Cir. 1969)." *Jarrett v. Resor*, 426 F.2d 213, 217 (9th Cir. 1970).

In *Jarrett* this court held that the petitioner was not in custody in the Northern District of California. While his home was in that district, he was in active military service and was stationed at Fort Knox, Kentucky. He was on leave in California awaiting "port call" pursuant to an assignment to duty in Vietnam. His command post remained Fort Knox. We held: "A member of the armed forces who is voluntarily in a place another than an assigned post is not in custody in that place." 426 F.2d at 217.

Respondents rely on that case as support for their contention that appellant was not in custody in California. We find that case distinguishable.

Here appellant's home is in the Northern District of California. As a member of the Army Reserve his activities are directed by the Reserve Officers' Components Personnel Center at Fort Benjamin Harrison, Indiana. He was, however, attached to no unit. We have here held that he was under sufficient restraint to constitute custody, and it was at his home in California that these restraints were imposed and their effect felt. Certainly the restraint did not involve performance of duty at Fort Benjamin Harrison. Appellant's home in California was, then, the delayed Reserve equivalent of a duty station.[2] We conclude that he was in custody in the Northern District of California.

[2]When the reservist is, with the approval of the Center, pursuing activities in a state other than his home, the pursuit of which provided the basis for his delayed status (as was true here while appellant was attending law school in Connecticut), it would seem that he is in custody in that state since he is in effect assigned to duty there

3. *Was the presence of appellant's commanding officer within the territorial jurisdiction of the District Court essential to its jurisdiction in habeas corpus?*

Historically, habeas corpus was available only to those persons held in actual physical confinement. Therefore, the respondent-custodian was always to be found in the territorial jurisdiction in which the prisoner-petitioner was held in custody. It is not surprising that no case prior to the expansion of the custody concept in *Jones v. Cunningham, supra,* held that one in custody within the territorial jurisdiction of the court could not there obtain habeas relief because of the absence of the proper respondent.[3] The territorial restrictions on habeas jurisdiction which did then develop were intended to avoid problems posed by having to transport a prisoner to a distant forum. See *Carbo v. United States,* 364 U.S. 611 (1961); *Ahrens v. Clark,* 335 U.S. 188 (1948).

Now that one may be in custody although not subject to actual physical restraints, the courts are confronted with a whole new class of petitioners, many of whom, like appellant, may be in custody in a state other than that in which the respondent is located.

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and it is there that restraints are felt. *Donigian v. Laird,* 308 F.Supp. 449 (D.Md. 1969); *Nason v. Secretary of the Army,* 304 F.Supp. 422 (D.Mass. 1969).

[3]There is language in a few cases to the effect that the presence of the respondent within the territorial jurisdiction is required, but the language was not directed to the problem we are facing. In most of the cases the critical factor in the opinion was the fact that the petitioner was not in custody in the jurisdiction. See *United States ex rel Keefe,* 222 F.2d 390 (D.C.Cir. 1954), *cert. denied,* 348 U.S. 952 (1955); *Sanders v. Bennett,* 148 F.2d 19 (D.C.Cir. 1945); *United States ex rel Harrington v. Schotfeldt,* 136 F.2d 935, 940 (7th Cir. 1943), *cert. denied,* 327 U.S. 781 (1946). Elsewhere similar language has been used to suggest that a court does not lose its habeas corpus jurisdiction when a petitioner is removed from the district as long as the respondent remains. *Ex Parte Endo,* 323 U.S. 283, 306 (1944).

We can see no persuasive reason for making physical presence of the respondent a jurisdictional requirement in such cases.[4] Since respondents seek to make their restraints felt on petitioner in California and thereby to extend the reach of their authority into the territorial jurisdiction of the District Court below, the respondents are in our view sufficiently present to be subject to the jurisdiction of that court.

As stated in *Donigian v. Laird*, 308 F.Supp. 449, 453 (D. Md. 1969):

> "For its own convenience and economy, the Army has chosen to centralize its command with respect to Reserve Officers in Donigian's position, rather than having smaller commands throughout the country. The effect on the plaintiff is no different, however, than it would be if his orders were issued to him directly from a local headquarters. The Army seeks to exert control over Donigian in Maryland. It cannot, then, avoid the jurisdiction of this court merely because such control is exercised from a point located outside of this state."

The District Court, then, had jurisdiction to entertain these proceedings. Having jurisdiction, venue is conferred by 28 U.S.C. §1391(e). Upon the cross-appeal of appellees, judgment is affirmed.

B. *THE MERITS*

In the processing of appellant's application for discharge at Fort Ord, appellant was first interviewed by an Army psychiatrist who found "no signs of psychiatric disease." He was then interviewed by an Army chaplain who reported: "I believe that he is sincere in indicating that his religious beliefs preclude participation in war in any form.

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[4]Of course, as this court noted in *George v. Nelson*, 410 F.2d 1179, 1181 (9th Cir. 1969), change of venue, pursuant to 28 U.S.C. §1404(a), is available in proper cases.

I believe that his convictions are primarily religious in basis and origin."

Appellant was then given a hearing by an Army captain as hearing officer. The hearing was thorough, consuming approximately three hours. The report of this officer discussed appellant's concept of a Supreme Being and of the nature of religion and his views respecting violence and war. The report concluded: "Based upon Lieutenant Strait's stated beliefs and the sincerity with which he appeared to hold these beliefs, it is my determination that Lieutenant Strait's beliefs fall with a *very liberal* interpretation of the case of *United States v. Seeger*, 85 S.Ct. 850 (1965)." Further, "it is my opinion that Lieutenant Strait's beliefs are sincerely held."

At Fort Benjamin Harrison appellant's record was first reviewed by a lieutenant colonel, chief of the Delayed Officer Management Division, acting in the capacity of appellant's immediate commander. His report recommended disapproval, citing appellant's political activities and concluding that the chaplain and the hearing officer "erred or were misled in their determination that [his] beliefs were religious in origin."

The Review Board then acted and, with three members out of fifteen participating, recommended disapproval for these reasons:

1. That appellant's beliefs were not truly held.

2. That they were not religiously founded but reflected political, sociological and philosophical views and a personal moral code.

3. That appellant's objections to war were confined to this particular war.

We have carefully reviewed the record and conclude that the findings of the Review Board are wholly without basis in fact.

The greater part of the Board's memorandum is devoted to the proposition that appellant's views were not reli-

giously founded. This, appellees concede, was error, since appellant's views meet the standards announced in *Welsh v. United States*, 398 U.S. 333 (1970), handed down after the Board had taken its action.

There is no support for the Board's finding that appellant's objections to war were limited to Vietnam. The application makes clear the scope of his objections to violence and to war in general. The fact that his political action and expressions of protest were directed against the one war in which this country was engaged is not inconsistent with his avowed beliefs. It indicates no more than that there was a limited area in which action in support of his beliefs was called for.

The sole remaining basis for rejection of the application was the Board's finding that appellant's views were not truly held. In this, acting upon the cold record and without benefit of interview or opportunity for rebuttal of its findings by appellant (which opportunity Army regulations appear to regard as due), it rejected the findings of those who had interviewed appellant to the effect that his views were sincerely entertained.

Two reasons were given by the Board. It stated that this was the first case of conscientious objection that the hearing officer had reviewed. This was simple error. The officer had had substantial past experience in this respect.

The sole remaining reason for finding lack of sincerity (and the reason on which appellees now rely as establishing basis in fact) was appellant's delay in applying for discharge after crystallization of his beliefs, which the hearing officer had found to have occurred in his second year of law school. The Board emphasized that there were earlier opportunities—occasions on which, if objections did exist, one would have expected them to be expressed: (1) Appellant in 1968 requested an extension of delay status to permit him to take a bar examination and qualify for judge advocate general commission (which commission he later refused); (2) in 1969 a certificate of medical fitness was

provided by him; (3) in 1969 he was promoted to the rank of first lieutenant.

The Board apparently felt that appellant had not adequately explained his delay in expressing his views. It concluded that he was nothing more than "an educated, skillful opportunist who had used his military status for every shred of protection it could offer and then, when called to active duty, attempted to gain relief from his obligation under the guise of a conscientious objector claim."

But the reasons for appellant's delay were explicitly set forth in his application and in a manner wholly consistent with the existence of conscientious objection.[5] He states that he recognized that he recognized that he had placed himself "in an untenable position in relation to the Army * * *. The last year of my life has been a stormy period of sould searching and agoning, trying to reconcile my beliefs and conscience with my contract with the Army." It was the suicide of his cousin (also a conscientious objector) in November of 1969 that ultimately "broke the emotional bind I was in and freed me to assert my beliefs."

We do not find it implausible that one with conscientious scruples[6] should find it difficult casually to dismiss his obligations to the Army. Rather we regard it as wholly consistent with conscientious objection that the enlisted soldier

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[5]The "opportunist" aspect disappears when it is recognized (as counsel for appellees concedes) that the "protection" enjoyed by appellant was no greater than the Selective Service regulations then applicable would have afforded through student deferments.

[6]That appellant's conscience manifested itself in areas other than objection to war is abundantly established. Among other activities he worked for the United States Commission on Civil Rights in Alabama and in the southwest; he participated in a project engaged in reviewing arrest records and interviewing blacks who had been arrested; he served as an observer of the first attempts of the blacks in Mississippi to organize politically.

should strive to find some means of reconciling a conflict between conscience and duty in such a fashion that both might be respected and to postpone repudiation of the claims of duty until it becomes clear that their demands make reconciliation impossible.

Accordingly we find the explanation given by appellant for delay in asserting his claim to be reasonable and credible unless some basis for rejecting it otherwise appears from the record. We have searched in vain for such basis.

We conclude, then, that no basis in fact exists for rejection of appellant's claim and that he is entitled to his discharge.

Appellant in his application for discharge expressed his consent to perform postmilitary work of the nature encompassed by the civilian work program administered by the Selective Service System. His hearing officer, in recommending discharge, recommended that he be required to perform such work. In our view such a condition of discharge would be proper under the circumstances.

Accordingly the matter is remanded with instructions that the Army be allowed a reasonable time within which to grant discharge to appellant pursuant to Army regulations applicable to conscientious objectors; failing which, discharge (subject to an order to perform appropriate civilian work) shall be granted by the District Court.

JAMESON, District Judge (Concurring):

I agree with Judge Merrill that there is no basis in fact for rejecting appellant's claim as a conscientious objector on the ground of insincerity. I think it is clear from the record before this court that appellant was a sincere conscientious objector when he applied for discharge on January 20, 1970 and for at least two years prior thereto. This conclusion, however, should not be construed as justifying or condoning appellant's conduct in accepting the benefits of his reserve commission without disclosing his conscientious objector beliefs until he was called for active duty.

Appellant attended Yale Law School from September, 1966 to June, 1969. The Hearing Officer found that appellant's beliefs were religious in nature, sincerely held, and became "fixed during [his] second year of law school," i.e., between September, 1967 and June, 1968. The finding of the Conscientious Objector Review Board (in a decision prior to Welsh v. United States, 398 U.S. 333 (1970) that appellant's "alleged conscientious objector beliefs are not truly held" was interwoven with its finding that the beliefs "are poorly grounded in religious training and belief; and any objection to war in any form he might truly hold is based solely on political reasons, sociological experiences, philosophical views, a personal moral code, and objection to a particular war." Appellees concede that appellant's beliefs, "if truly held, would qualify under Welsh v. United States * * * ."

Appellant's detailed application recounts substantial anti-war and antidraft activities beginning in the fall of 1967 and, as he stated, much of his work "concerned conscientious objection." All of the other evidence presented in support of the application indicates that appellant's conscientious objector beliefs were truly held under the test of religious belief recognized in Welsh.

On the other hand, I think the Board could properly find that the imminence of active duty was the cause of appellant's application for discharge. On August 20, 1968, appellant requested that his delayed status be continued until January 1, 1970 to permit him to take the California bar examination and qualify for a Judge Advocate General commission. On February 15, 1969 he returned a Certification of Medical Fitness indicating that he was physically qualified for military service. On June 7, 1969 he was promoted to first lieutenant, and apparently accepted without comment. On July 9, 1969, after declining an appointment in the Judge Advocate General Corps, appellant was notified that he was scheduled to report for active duty on February 9, 1970 (later amended to April 13, 1970). On October 1, 1969 he again requested rescheduling of his active duty commencement date. On January 20, 1970 applicant sub-

mitted his application for discharge as a conscientious objector. At no time prior thereto had he asserted his conscientious objector beliefs.

It is true, as appellees argue, that this court has held in a number of cases that the Board may consider "suddenness of conversion," particularly after receipt of an order to report for active duty, in determining whether conscientious objector beliefs are sincerely held.[1] These cases were decided prior to Welsh v. United States and are distinguishable with respect to the religious test to be applied. In most of them there was additional evidence to support a finding of insincerity. By reason of appellant's failure to assert his conscientious objector beliefs until called for active duty, a close question is presented.[2] From a review of all the evidence, however, I conclude that this fact alone is not sufficient to support a finding that applicant's conscientious objector beliefs were not truly and sincerely held.[3]

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[1]See e.g., Maynard v. United States, 409 F.2d 505 (1969); Bishop v. United States, 412 F.2d 1064 (1969); Negre v. Larsen, 418 F.2d 908 (1969); and Speer v. Hedrick, 419 F.2d 804 (1969).

[2]The obvious feeling of the Board that appellant should have submitted an application for discharge at an earlier date is understandable. It is true, as the Board's decision indicates, that appellant was willing to accept any benefits of his status as a reserve officer until he was required to report for active duty. On the other hand, there was no legal obligation to submit an earlier application, and his own explanation, as set forth in Judge Merrill's opinion, is credible, even though different inferences may also properly be drawn.

[3]In fact, it is difficult to see how appellant could have entered active duty without making an application for discharge in the light of his beliefs and activities as set forth in detail in the record.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LIEUTENANT JOHN A. STRAIT,
Petitioner-Appellant,

v.

MELVIN R. LAIRD, Secretary of Defense;
STANLEY R. RESOR, Secretary of the Army;
LIEUTENANT GENERAL STANLEY LARSEN, Commanding General, Sixth United States Army;
MAJOR GENERAL PHILLIP B. DAVIDSON, JR., Commanding General, Fort Ord, California;
COLONEL JOHN J. HOFFMAN, Commanding Officer, United States Army Reserve, Components Personnel Center, Fort Benjamin Harrison, Indiana,
Respondents-Appellees.

No. 26,289

[June 4, 1971]

ORDER ON REHEARING

Before: MERRILL and KOELSCH, Circuit Judges, and JAMESON, District Judge*

Appellees' petition for rehearing is granted.

It is ordered that the opinion filed herein on February 17, 1971, is withdrawn and the judgment rendered is vacated and that in their stead the accompanying opinion and judgment will be filed.

*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation

On Appeal from the United States District Court for the Northern District of California

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Before: MERRILL and KOELSCH, Circuit Judges, and JAMESON, District Judge*

PER CURIAM:

By these proceedings in habeas corpus appellant seeks judicial review of an administrative decision of the Department of the Army denying his request for discharge as a conscientious objector. This appeal is taken from judgment of the District Court for the Northern District of California denying, on the meirts, the relief sought. A cross-appeal has been taken by appellees from that portion of the District Court's judgment holding that it had jurisdiction in habeas corpus. We do not reach the merits of appellant's appeal, for we conclude that on the cross-appeal of appellees judgment of the District Court must be reversed and the proceedings dismissed for lack of jurisdiction.

Appellant is an officer in the United States Army Reserve. He received his commission in 1966 on completion of the ROTC course at the University of California at Davis. He was then placed on a delayed reserve status in order to permit him to attend law school at Yale University, from which he graduated in 1969. Since he has not yet reported for active duty, appellant is attached to no unit. As a member of the army reserves, his activities are directed by the United States Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana.

On January 20, 1970, appellant applied for discharge as a conscientious objector. Pursuant to army regulations the applicaion was submitted to the Reserve Components Personnel Center. Since appellant was residing at his home in the Northern District of California, processing of the appli-

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*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

cation by interviews and hearing was had at Fort Ord, California, and the record was then forwarded to Indiana for review by the Conscientious Objector Discharge Review Board. On the Board's recommendation the application for discharge was disapproved by the commander of the Personnel Center. This action followed.

Appellant argues that he is in custody within the territorial jurisdiction of the District Court below and, therefore, that that court had jurisdiction in habeas corpus. *Schlanger v. Seamans*, U.S. (March 3, 1971), compels us to disagree. Even if we concede that appellant is in custody within the jurisdiction of the District Court (which appellees dispute),[1] his custodian—the commander of the Reserve Components Personnel Center at Fort Benjamin Harrison—remains outside of the jurisdiction of that court. As stated in *Schlanger*: "Hence, even if we assume that petitioner is 'in custody' in Arizona in the sense that he is subject to military orders and control which act as a restraint on his freedom of movement * * * the absence of his custodian is fatal to the jurisdiction of the Arizona District Court."

Appellant contends that, as an alternative to his habeas corpus theory, the District Court had jurisdiction in mandamus to require the army to process his application for discharge in accordance with regulations with which it has allegedly failed to comply. Mandamus is an extraordinary remedy which is to be utilized only in the most urgent cases. *See, e.g., Ex Parte Collett*, 337 U.S. 55, 72 (1949). Its issuance lies within the sound discretion of the court. *Cmax Inc. v. Hall*, 300 F.2d 265 (9th Cir. 1969); *see Whitehouse v. Ill. Cent. R. Co.*, 349 U.S. 366, 373 (1955). Since appellant asserts that the army's decision to deny him his discharge was without basis in fact, the mandamus remedy would not afford complete relief. *Cf., Pacific Car and Foundry Co. v. Pence*, 403 F.2d 949, 952-53 (9th Cir.

[1] This question the Supreme Court in *Schlanger* did not reach, although it noted the problem and cited *Donigan v. Laird*, 308 F. Supp. 449 (D. Md. 1969), on which appellant relies.

1958). Above all, since appellant may obtain relief by habeas corpus in the federal courts in Indiana, there exists another adequate remedy. *See Carter v. Seamans*, 411 F.2d 757 (5th Cir. 1969). For these reasons we feel that issuance of the writ in these circumstances would not be appropriate.[2]

Upon the cross-appeal of appellees judgment is reversed and the matter remanded to the District Court with instructions that the proceedings be dismissed for want of jurisdiction.

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[2]This is not to say that the court lacked jurisdiction to issue a writ. The territorial restraints which obtain in habeas do not preclude mandamus jurisdiction. *See Schlanger v. Seamans, supra,* at n. 4; 28 U.S.C. § 1391 (e); Sen. Rep. No. 1992, 87th Cong., 2d Sess., 2 U.S. Code and Adm. News (1962) 1784; 2 Moore's Federal Practice ¶ 4.29.